

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LLOYD J. MARSHALL, JR.,)
d/b/a MARSHALL ASSOCIATES,)

Plaintiff)

v.)

Docket No. 03-26-P-H

SCOTIA PRINCE CRUISES LIMITED,)

Defendant)

**RECOMMENDED DECISION ON DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT**

The defendant, Scotia Prince Cruises Limited (“SPC”), moves for summary judgment on all counts of the plaintiff’s complaint. I recommend that the court grant the motion.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.’” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spiegel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

II. Factual Background

The following undisputed material facts are appropriately supported in the parties' respective statements of material facts, submitted pursuant to this court's Local Rule 56.

SPC is and was at all relevant times a Bermuda corporation. Defendant's Statement of Material Facts as to Which There is No Genuine Issue to be Tried ("Defendant's SMF") (Docket No. 13) ¶ 1; Plaintiff's Response to Defendant's Statement of Material Facts ("Plaintiff's Responsive SMF") (Docket No. 19) ¶ 1. SPC operates the M/S Scotia Prince, a vessel registered in Panama, as a ferry between Portland, Maine and Yarmouth, Nova Scotia on a seasonal basis. *Id.* ¶ 2. At all relevant times, the plaintiff lived in New Hampshire. *Id.* ¶ 4. Around 1977 the plaintiff approached SPC's then president about supplying an advertising magazine or magazines for distribution on the vessel and elsewhere, and the president agreed. *Id.* ¶ 5.

SPC began using the name Scotia Prince in 1982 and has continuously used the name and logo since then. *Id.* ¶ 7. Around the time the Scotia Prince started sailing, the plaintiff sought and obtained permission from SPC to call the magazine “Scotia Prince Digest.” *Id.* ¶ 6. Each year from 1977 to 2000 the plaintiff requested permission to distribute the magazine on board the Scotia Prince. *Id.* ¶ 12.¹ During this period, it was agreed that the plaintiff had no obligation to produce the magazine in any given year and that the defendant had the right to cancel the agreement immediately if not satisfied. *Id.* ¶ 13. The Scotia Prince Digest was not produced in 1994, 1995 and 2001. *Id.* ¶¶ 14-15. The parties entered into an agreement dated September 1, 2001 which stated, *inter alia*, that the plaintiff “proposes to supply a publication . . . to be distributed on-board the MV Scotia Prince during the 2002 Portland-Yarmouth season,” and that “subject to satisfactory performance by Marshall as mutually determined by SPC these terms shall apply to a new Publication to be produced for the 2003 Portland-Yarmouth season.” *Id.* ¶¶ 16-18.

The agreement also provided that starting July 1, 2002 the plaintiff would pay SPC “40% of the net profits realized from the production of the Publication, all as defined in Schedule B. It is agreed that Marshall shall book only his actual overhead costs, not to exceed the sums indicated in Schedule B. In each year on or before July 1 Marshall shall make full written disclosure of all revenues and expenses with supporting documentation.” *Id.* ¶ 20.² The agreement further provided that the plaintiff would “report, on a

¹ The plaintiff denies this paragraph of the defendant’s statement of material facts, asserting that “[t]he citation does not support defendant’s statement.” Plaintiff’s Responsive SMF ¶ 12. However, the defendant amended the citation given for this paragraph of its statement of material facts with the permission of the court and without objection by the plaintiff, Docket Nos. 20 and 22, and the citation given in the amended version, Docket No. 23, does support the factual assertion made in paragraph 12.

² The plaintiff purports to qualify this paragraph of the defendant’s statement of material facts, asserting that despite the language of the agreement, the parties actually meant that the overhead listed on Schedule B “was agreed to and Marshall would only have to justify his actual overhead costs if they exceeded the estimated fixed overhead.” Plaintiff’s Responsive SMF ¶ 20. However, the citation given by the plaintiff does not support this assertion and it will therefore *(continued on next page)*

regular basis, on sales, including company names of the advertisers.” *Id.* ¶ 21. The plaintiff did not pay SPC any money in connection with the 2002 Digest. *Id.* ¶ 23. The plaintiff indicated to SPC that no money was due to SPC because expenses associated with the Digest substantially exceeded revenues so that no net profit existed. *Id.* ¶ 24. The only documentation of expenses or revenues in 2002 provided to SPC by the plaintiff was a one-page document, which merely restates the “not to exceed” amount of overhead set forth in Schedule B of the agreement and lists advertisers. *Id.* ¶ 25.³ At SPC’s request, the plaintiff submitted an entirely new proposal for 2003. *Id.* ¶ 28.

SPC notified the plaintiff by e-mails on August 9 and August 12, 2002 that SPC would not be using his services in the future. *Id.* ¶ 31. One of these e-mails included the following statement:

It has been determined by SPC that the performance was unsatisfactory[;] thus a new publication will not be produced by Marshall for the 2003 season. If an onboard publication is produced for the 2003 season, it will be done by us or by a person(s) of our choice.

Id. ¶ 32. From some time in 2002 through the present, Peter McNeil, SPC’s marketing manager for Atlantic Canada, has been responsible for compiling and soliciting advertisers for the Scotia Prince’s onboard digest. *Id.* ¶ 33. In a letter to potential advertisers, SPC, through its vice-president and chief operating officer stated:

I realize that many of you have historically dealt with our contracted service supplier. However, in an effort to gain better efficiency and effectiveness, we have hired a province-based Nova Scotian. Thus, Peter [McNeil] is our *sole* authorized representative who is responsible for preparing all facets of our onboard magazine.

not be considered further.

³ The plaintiff contends that he “was not provided th[e] opportunity to produce more detailed information.” Plaintiff’s Responsive SMF ¶¶ 25-26.

Id. ¶ 35 (emphasis in original). Although SPC initially assumed that it would continue to use the name “Scotia Prince Digest” for its on-board advertising digest, the title was change to “The Tartan” before publication. *Id.* ¶ 38.

To determine what businesses were advertising in the Nova Scotia market, McNeil compiled a list of potential advertisers from all provincial tourism guides and tourism publications he could locate; his sources included the on-board magazine of a competitor, the Scotia Prince Digest, Neptune Theater Guide, Taste of Nova Scotia '02 Guide, and various other Nova Scotia magazines and newspapers targeting tourists coming to Canada. *Id.* ¶ 42. All of McNeil’s communications with prospective advertisers were conducted in Canada; all letters were sent out and all telephone calls were made from his office in Yarmouth, Nova Scotia; and the letter sent to potential advertisers was printed/mail-merged in Nova Scotia and mailed in Nova Scotia. *Id.* ¶ 43. All of the potential advertisers contacted by McNeil were located in the maritime provinces of Canada; he did not solicit anyone in the United States. *Id.* ¶ 44. All of the advertisers in the 2002 Scotia Prince Digest are in Canada. *Id.* ¶ 46.

Shortly before May 2, 2003 SPC learned that the plaintiff was continuing to use the name “Scotia Prince” in his website, www.scotiaprincdigest.com. *Id.* ¶ 48. By letter of that date, SPC demanded that the plaintiff promptly cease using the name “Scotia Prince.” *Id.* Neither the plaintiff nor his attorney responded to the letter. *Id.* ¶ 50. After an indefinite period during which the website was “closed,” it was reactivated and is currently active. Plaintiff’s Responsive SMF ¶ 50.

III. Discussion

The complaint asserts claims of copyright infringement, breach of contract, unfair trade practices in violation of state and federal law and deceptive trade practices in violation of state law. Complaint (Docket No. 1) at 3-8. SPC seeks summary judgment on each of the four asserted counts.

A. Copyright Claim (Count I)

In response to SPC's motion on this count, the plaintiff defines his claim as follows:

[P]laintiff's copyright claim focuses on defendant's use and distribution of his 2002 publication "Scotia Prince Digest" as a selling tool for its 2003 publication and its claims in the September 17, 2002 letter that it published *Scotia Prince Digest* and that advertising in Scotia Prince Cruises [sic] 2003 on-board publication would be "renewal" advertising; and, the advertising leaflet that falsely claimed that the "*Tartan*" was formerly known as the *Scotia Prince Digest*.

The September 17, 2002 letter was distributed to not less than 74 recipients, all of whom were advertising customers of the plaintiff. The defendant's use of the plaintiff's copyrighted work to sell advertising in its 2003 on-board publication, subsequent compilation of an arguably derivative work known as the "*Tartan*," and the defendant's claim of ownership, control and successor status to *Scotia Prince Digest* constitute violations of the Copyright Act

Plaintiff's Objection to Defendant's Motion for Summary Judgment, etc. ("Opposition") (Docket No. 18) at

7. The plaintiff does not explain *how* any of these alleged acts constitutes such a violation. In addition, the plaintiff did not submit a statement of additional material facts as contemplated by Local Rule 56(c), choosing instead solely to respond to the defendant's statement of material facts. As a result, the following assertions in the passage quoted above lack appropriately-provided factual support and will not be considered further:

(i) "The September 17, 2002 letter was distributed to not less than 74 recipients, all of whom were advertising customers of the plaintiff."

(ii) "[T]he [unidentified] advertising leaflet that falsely claimed that the '*Tartan*' was formerly known as the *Scotia Prince Digest*."

(iii) SPC distributed the 2002 Scotia Prince Digest as a selling tool for its 2003 publication.

(iv) SPC made claims in a September 17, 2002 letter.⁴

(v) SPC claimed to own or control the Scotia Prince Digest, as distinguished from ownership of the title “Scotia Prince Digest.”⁵

The plaintiff’s remaining factual allegations find some support in the defendant’s statement of material facts and the plaintiff’s qualifying responses, interpreted favorably to the plaintiff as the nonmoving party. However, the court is hampered by his conclusory argument. He asserts that the Tartan is “an arguably derivative work,” *id.* at 7, but does not explain how that conclusion comports

⁴ No letter with such a date is mentioned in the defendant’s statement of material facts or in the plaintiff’s response. The only letter mentioned in the defendant’s statement of material facts as being sent to potential advertisers, Defendant’s SMF ¶ 35, is dated September 24, 2002, Exh. A to Affidavit of Peter McNeil (“McNeil Affidavit”) (Docket No. 16), and cannot reasonably be read to assert that SPC published the Scotia Prince Digest or that advertising in the 2003 on-board magazine would be “renewal” advertising.

⁵ The plaintiff specifically disavows any claim based on the title or name itself. Opposition at 7.

with the language of 17 U.S.C. § 106(2), the only authority which he cites in support of his position, *id.* at 6. He does not cite any provision of the Copyright Act that he alleges was violated by SPC's use of the 2002 digest as a selling tool, its statement that advertising in the 2003 publication would be renewal advertising, or its claim that the 2003 publication was a successor to the 2002 publication.

Section 106 of Title 17 of the United States Code provides, in relevant part, as follows:

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

* * *

- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership

17 U.S.C. § 106. A work is not derivative unless it is substantially similar to prior copyrighted work. *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984). Here, the evidence properly before the court is that the plaintiff created “at least two of the advertisement [sic] for his advertisers which were then used in *The Tartan*,” and that, if he created ad copy without compensation from the advertiser, he did not permit the advertiser to use the ad in other publications. Defendant's SMF ¶¶ 40-41, Plaintiff's Responsive SMF ¶¶ 40-41. The plaintiff does not state whether the two advertisers for whom he created copy were permitted to use that copy in other publications. A brief review of the 2002 and 2003 publications, Exh. 11 to the deposition of Lloyd J. Marshall, Jr. and Exh. B to the McNeil Affidavit, shows that far more than two advertisements are included in each, and the plaintiff's two advertisements cannot therefore provide a substantial similarity between the two publications. This evidence accordingly cannot provide the basis for a claim of derivative use. The plaintiff otherwise declines to specify the manner in which the 2003 publication is assertedly derivative of the 2002 publication, merely “assert[ing] that the magazines are similar in arrangement and content,” inviting the court to “[s]ee[] defendant's referenced exhibits.” Plaintiff's

Responsive SMF ¶ 39. This is far too cursory an evidentiary presentation to avoid the imposition of summary judgment. *See Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990) (summary judgment appropriate where nonmoving party rests merely upon conclusory allegations, improbable inferences and unsupported speculation).

With respect to the remaining specific allegations of infringement, nothing in the language of section 106 or 17 U.S.C. §§ 102(a) and 107, the only other citations provided by the plaintiff, Opposition at 6, appears to prohibit SPC's use of the 2002 digest as a selling tool, its statement that advertising in the 2003 publication would be renewal advertising, or its claim that the 2003 publication was a successor to the 2002 publication.⁶ In the absence of any citation to authority suggesting otherwise, SPC is entitled to summary judgment on these claims, and, as a result, on Count I.

B. Breach of Contract (Count II)

Count II of the complaint alleges that SPC breached the written agreement between the parties by deciding not to continue the arrangement in 2003. Complaint ¶¶ 23-28. SPC contends that "the plain language" of the agreement indicates that it will apply to a 2003 publication "only if Defendant has determined Plaintiff's performance to be satisfactory." Defendant's Motion for Summary Judgment, etc. ("Motion") (Docket No. 12) at 9. The plaintiff responds that the language of the agreement is ambiguous

⁶ To the extent that the plaintiff's claim that SPC violated 17 U.S.C. § 106(3) by distributing copies of the 2002 publication survives his failure to provide evidentiary support for the claim, I note that 17 U.S.C. § 109(a) provides that the owner of a particular copy of the work at issue "lawfully made under this title" is entitled, without the authority of the copyright owner, to sell or otherwise dispose of that copy. The 2002 publication, as was the case with all other years' issues under the name "Scotia Prince Digest," was distributed exclusively through SPC, other than copies given to advertisers. Defendant's SMF ¶ 11; Plaintiff's Responsive SMF ¶ 11. *See also* Exh. A to the Affidavit of John Hamill ("Hamill Aff.") (Docket No. 14), at 1 (9/1/01 written agreement between parties; plaintiff agrees to "supply" the 2002 publication to SPC). SPC accordingly must be deemed to have been the owner of the copies of the 2002 publication provided to it by the plaintiff and its distribution of some of those copies to potential 2003 advertisers, if it happened at all, would not have violated the Copyright Act.

and that he is therefore “entitled to present his case to the jury.” Opposition at 8-9. The specific language at issue is the following:

[S]ubject to satisfactory performance by Marshall as mutually determined by SPC these same terms shall apply to a new Publication to be produced for the 2003 Portland Yarmouth season.

Letter of Agreement, Exh. A to Hamill Aff., at 1. On its face, the phrase “as mutually determined by SPC” appears to be ambiguous, or at least internally contradictory. One entity cannot “mutually” determine anything.

If a contract is ambiguous, Maine law directs that interpretation of the contract is a question of fact; if the contract is unambiguous, interpretation is a question of law for the court. *Lee v. Scotia Prince Cruises Ltd.*, 828 A.2d 210, 213 (Me. 2003). The question whether a contract is ambiguous is itself a question of law. *Id.* “Contract language is ambiguous when it is reasonably susceptible of different interpretations.” *Id.* (citation omitted). A court interpreting a contract must look at the whole instrument and construe it so as to give force and effect to all of its provisions. *American Prot. Ins. Co. v. Acadia Ins. Co.*, 814 A.2d 989, 993 (Me. 2003). Language in a contract should be given its plain meaning. *Id.*

Here, the plaintiff contends that the quoted contract language means that the agreement “could only be terminated [by a] mutual determination that Marshall’s performance in 2002 was unsatisfactory.” Opposition at 8. SPC contends that the language means that “before the agreement was extended to the 2003 season, Defendant would have to determine that Plaintiff’s performance was satisfactory.” Motion at 10. Neither contention appears immediately to follow the “plain language” of the contractual phrase at issue. The language clearly contemplates a determination that performance was satisfactory, not that it was

unsatisfactory. In other words, the plaintiff does not offer a reasonable interpretation of the phrase.⁷ SPC essentially asks this court to read the word “mutually” out of the contract or to draw an inference that the plaintiff would always consider his own performance to be satisfactory. The construction of the phrase is certainly awkward. However, if the phrase is read without the words “by SPC” it is clear that satisfactory performance could not be “mutually determined” without SPC’s agreement. If the word “mutually” is omitted, the same result obtains. Thus, while there may be an ambiguity as to whether the language at issue required the plaintiff’s joinder in a determination that the plaintiff’s performance in 2002 was satisfactory in order for the contract term to be extended, the only reasonable interpretation of the contract is that, in any event, SPC was required to make such a determination as a condition of any obligation to extend the agreement to a 2003 publication. See *Botka v. S.C. Noyes & Co.*, __ A.2d __, 2003 WL 22461786 (Me. Oct. 31, 2002) ¶¶ 21-22 (contract is not ambiguous if there is only one reasonable interpretation of language at issue). The plaintiff does not dispute that SPC did not determine that his performance in 2002 was satisfactory. Accordingly, as a matter of law, SPC is entitled to summary judgment on Count II.

III. Unfair Trade Practices (Count III)

SPC contends that the plaintiff has no cause of action under either the Federal Trade Commission Act, 15 U.S.C. § 40 *et seq.*, or the Maine Unfair Trade Practices Act, 5 M.R.S.A. §205-A *et seq.*, Motion at 11-12, the two statutory schemes invoked in Count III, Complaint ¶ 33. The plaintiff responds, confusingly, that he “is only making a claim pursuant to the Federal Trade Commission Act . . . to the extent that it provides insight to an interpretation of the Maine Unfair Trade Practices Act,” and agrees that 15

⁷ In addition, because it may reasonably be assumed that a party to a contract will not determine that his own performance has been unsatisfactory, the plaintiff’s proffered interpretation would have the effect of rendering the reference to SPC’s determination surplusage, a construction of contract language that is to be avoided. *Pelkey v. General Elec. Capital Assurance Co.*, 804 A.2d 385, 388 (Me. 2002).

U.S.C. § 45, the only federal statute cited in his complaint “confers no private right of action.” Opposition at 9. With respect to the state-law claim, he asserts that a disputed issue of material fact exists. *Id.* at 9-10.

To whatever extent the plaintiff purports to make a claim under the federal act, it is clear that he has no right of action as a private individual, *e.g.*, *FTC v. Owens-Corning Fiberglas Corp.*, 853 F.2d 458, 464 (6th Cir. 1988); *Baum v. Great Western Cities, Inc.*, 703 F.2d 1197, 1209 (10th Cir. 1983), and the motion for summary judgment should be granted as to any such claim.

With respect to the state-law claim, the Maine Unfair Trade Practices Act provides a private cause of action only to

[a]ny person who purchases or leases goods, services or property, real or personal, primarily for personal, family or household purposes and thereby suffers any loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 207 or by any rule or regulation issued under section 207, subsection 2 . . .

5 M.R.S.A. § 213(1). The plaintiff has offered no factual assertions from which any inference could reasonably be drawn to suggest that he purchased or leased goods, services or property from SPC primarily for personal, family or household purposes. Accordingly, he has no right of action under the Maine statute, and SPC is entitled to summary judgment on Count III.

D. Deceptive Trade Practices (Count IV)

The final count of the complaint alleges violation of the Maine Deceptive Trade Practices Act (“the Act”), 10 M.R.S.A. § 1212. Complaint ¶¶ 36-39. SPC contends that it is entitled to summary judgment on this claim because none of the activity of which the plaintiff complains took place in Maine, that none of the activity violated the Maine act and that no monetary damages are available under the Maine act. Motion at 12-14.

The plaintiff responds that “Maine courts have repeatedly found that the corporation, Prince of Fundy Cruises [apparently a corporate predecessor of SPC], owner and operator of the vessel Scotia Prince, is subject to the jurisdiction of the Maine courts.” Opposition at 12. The fact that the courts of Maine have jurisdiction over the defendant has no effect whatsoever on the questions whether the Act has extra-jurisdictional application, or whether any alleged violations of the Act took place in Maine. This argument need not be considered further.

The plaintiff does not dispute SPC’s contention that the Act does not apply to events or activity that occur outside of Maine, arguing only that some violating acts took place in Maine. Opposition at 11-12. I agree that the Act does not reach extra-territorial events. *See Arizona Commercial Mining Co. v. Iron Cap Copper Co.*, 119 Me. 213, 223 (1920) (“[A] remedy provided by statute will not be given extra-territorial effect unless such effect is within the contemplation of the act.”). Nothing in the Act, 10 M.R.S.A. §§ 1211-16, suggests any intent to apply its terms to actions that occur outside Maine.

The plaintiff asserts the “[i]n essence, the basis for the parties’ relationship and the alleged wrongful acts by the Defendant took place within the confines of the state of Maine.” Opposition at 11. Notwithstanding where the “basis” for the alleged wrongful acts may have “taken place,” the acts themselves must have taken place in Maine for this claim to be viable. The complaint alleges that the Act was violated by SPC’s “continued use of the title Scotia Prince Digest.” Complaint ¶¶ 36-39. None of the paragraphs of the complaint nor any of the plaintiff’s responses to the defendant’s statement of material facts specifies that such continued use occurred in Maine. The plaintiff therefore may not avoid the entry of summary judgment on this claim on the basis of such continued use.

In his opposition to the motion, the plaintiff lists the following as specific, additional incidents of violation of the Act: one or more meetings between the parties took place in Portland, Maine; distribution of

“the magazines at issue” aboard a ship that “went into the port in Portland” and “when they entered the compound in Portland” (emphasis deleted); obtaining and using proprietary information gained through such meetings; and suggesting that “a new digest was merely a ‘successor’ to the *Scotia Prince Digest*.” Opposition at 11-13. The plaintiff has offered no evidence that any suggestion by SPC that the 2003 publication was “merely a successor” to the 2002 publication was made in Maine; the only evidence in the summary judgment record is to the contrary. Defendant’s SMF ¶¶ 33, 35-37, 43-46; Plaintiff’s Responsive SMF ¶¶ 33, 35-37, 43-46. With respect to the remaining incidents listed by the plaintiff, he has not provided any factual support through a statement of material facts as required by Local Rule 56. To the extent that any of these incidents could properly be characterized as violations of the Act, an issue which need not be addressed here, the plaintiff’s failure to provide any factual support in the manner required by this court’s local rule means that none of the alleged incidents may be considered for purposes of summary judgment. Accordingly, on the showing made, SPC is entitled to summary judgment on Count IV.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant’s motion for summary judgment be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.

Dated this 17th day of November, 2003.

/s/ David M. Cohen

David M. Cohen

United States Magistrate Judge

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